UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CAESARS ENTERTAINMENT d/b/a
RIO ALL-SUITES HOTEL AND CASINO

and **Case 28-CA-060841**

INTERNATIONAL UNION OF PAINTERS
AND ALLIED TRADES, DISTRICT COUNCIL 15,
LOCAL 159, AFL-CIO

BRIEF IN SUPPORT OF ACTING GENERAL COUNSEL'S EXCEPTIONS

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I. INTRODUCTION

Pursuant to Section 102.46 of the Board's Rules and Regulations, the Acting General Counsel (General Counsel) files the following Brief in Support of Exceptions to the Decision of Administrative Law Judge William L. Schmidt, JD(SF)-11-12, issued on March 20, 2012. Other then what is excepted to herein, the findings of the Administrative Law Judge (ALJ) are appropriate and proper.

The ALJ erred in dismissing 9 out 10 rules maintained in the employee handbook of Caesars Entertainment, Inc., d/b/a Rio All-Suites Hotel and Casino (Respondent) and alleged to be violative of Section 8(a)(1) because of their overly broad language and chilling effect on employees. In dismissing the allegations, the ALJ failed to correctly apply the Board's standards established in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004), which held that

where a rule does not explicitly restrict Section 7 activity, it is nonetheless unlawful where employees would reasonably construe the rule to prohibit Section 7 activity. In the majority of situations, the ALJ erroneously concluded that when examined as a whole along with the record evidence, employees would not reasonably construe the rules to restrict activities otherwise guaranteed by the Act. Moreover, the ALJ, limited by Board precedent, declined to consider the General Counsel's arguments related to the Board's decision in *Register Guard,* 351 NLRB 1110 (2007).

Notwithstanding the recommendations of the ALJ, an examination of the relevant rules, when viewed by Respondent's employees, would be reasonably construed to inhibit their Section 7 rights. The ambiguity of the rules and the lack of context, leaves reasonable employees with no other choice but to conclude that the rules apply to all conduct, including conduct protected by the Act. The instant case also includes a rule which falls under the Board's ruling in *Register Guard.* Id. While the Board's holding in *Register Guard* admittedly applies, the Board should reconsider its prior ruling and the implications that the Decision has on employees who in today's modern era are increasingly required to use the latest means of communication media, including e-mail as part of their day to day responsibilities.

II. FACTS

Respondent is 1 of 10 properties in Las Vegas, Nevada, which is owned and operated by Caesar's Entertainment, Inc. (Tr. 27:2-12)[1] Of its approximately 3,000 employees, roughly 1,700 are covered by three collective-bargaining agreements between Respondent and four

[1] GCX___ refers to General Counsel's Exhibit followed by exhibit number; RX___ refers to Respondent's Exhibit followed by exhibit number; JTX ___ refers to Joint Exhibit followed by exhibit number. "Tr. __:___" refers to transcript page followed by line or lines of the unfair labor practice hearing held on January 10, 2012.

separate labor organizations. The remaining employees are unrepresented for purposes of collective bargaining. (Tr. 27:13-15; 61:12-23; ALJD at 2)

Respondent maintains work rules and policies set forth in "The Rio Employee Handbook" (Employee Handbook) which is distributed to each of its employees. (JTX 2) Employees are expected to read, understand, and comply with the rules and policies contained in the Employee Handbook. (JTX 1) Upon receipt of the Employee Handbook, employees are required to sign and return an acknowledgement form acknowledging receipt of the Employee Handbook and confirming their responsibility to comply with the regulations, policies, and procedures contained therein. (JTX 1, 3) The policies, procedures, and rules contained in the Handbook apply to all of its employees, regardless of whether they are represented by a labor organization.

III. ARGUMENT

A. The ALJ Erred in Not Finding that the "Appearance Standards" for "Visiting Property When Not in Uniform" set forth in Respondent's Employee Handbook Are Not Violative of Section 8(a)(1). [Exception No. 1]

The ALJ erred in failing to find that the appearance standards for employees who visit Respondent's "property when not in uniform" as set forth on page 2.7 of the Employee Handbook does not violate Section 8(a)(1). The rule, appearing under the section "Visiting Property When Not in Uniform" reads:

> **Visiting Property When Not in Uniform:** When on property while off duty for training, New Hire Orientation, meetings, or coming in to change for work, he following Appearance Guidelines apply: All clothing must be neat and presentable. Clothing may not be torn, damaged or defaced in any way. The following items should be worn: shirts, shoes, or strapped sandals and name tag/badge if on property for work-related reasons or back of house services (e.g. HR Payroll). The following may not be work: bathing suits, short shorts, thong-type sandals, tube tops, halter tops, tank tops, thin straps strap less clothing, midriff tops, *clothing which displays profanity, vulgarity*

of any kind, obscene or offensive words or pictures. (JTX 1, pg. 2.7) (emphasis)

In dismissing this allegation, the ALJ reasoned that employees would not reasonably construe the rule to prohibit Section 7 activity because "the evidence shows that employees frequently wear clothing at the facility that bears a union message." (ALJD at 4:4-5) Moreover, the ALJ concluded that when "fairly read, in the context where it appears, the adjective 'offensive' addresses matters of taste a reasonable person would regard as outside the norms of decency common in the community from which Respondent draws its customers." (ALJD at 4:8-11) In reaching his conclusion, the ALJ erroneously relied on evidence which falls short of establishing that Respondent's employees would not reasonably construe the rule in question to inhibit their Section 7 rights. Further, a reading of the rule, in full context, fails to establish, as the ALJ suggests, that the term "offensive" is limited to "matters of taste."

As previously noted, the record evidence established that of Respondent's approximately 3,000 employees, roughly 1,700 are represented by a labor organization. The record further established that of Respondent's 1,700 represented employees, some wear union apparel to work that bear a union message. (Tr. 61:12-25; 62-1-25) In concluding that employees would not construe the rule to prohibit Section 7 activity, the ALJ relied heavy upon the fact that some employees, specifically those already represented by unions, wear articles of clothing which display union messages while at work without interference by Respondent. Reliance upon such facts is erroneous as the record does not establish that Respondent's remaining unrepresented employees (approximately 1,300) have any knowledge of what kind of apparel their represented co-workers wear or that, based on viewing represented co-workers wear certain articles of clothing, they would conclude that they too have the right to engage in similar conduct. Accepting such an assumption would make it reasonable for unrepresented employees to assume

that they have the right to a representative during a disciplinary meeting or that they can file grievances simply because their represented co-workers enjoy this right. Moreover, the record is silent as to the types of messages displayed on clothing of represented employees, thus requiring the ALJ to speculate that the content of the messages would not differ in the absence of the rule.

In *Republic Aviation Corp.*, 324 U.S. 793 (1945), the Supreme Court upheld as protected activity the right of employees to wear union buttons while at work. Consistent with that principle and established Board law, the general rule is that employees may wear not only union buttons but also other emblems of union support and membership such as badges, hats, and T-shirts to work. *Fairfax Hospital*, 310 NLRB 299, 307 (1993). Similarly, employees may also wear articles of clothing that express support for issues of common concern related to their hours, wages, or working conditions. See generally, *Medco Health Solutions of Las Vegas*, 357 NLRB No. 25, slip. op. at 1-2 (2011). The Section 7 rights of employees, however, may give way to employer limitations when "special circumstances" exist and override the rights of employees and legitimize the regulation on or prohibition of such apparel. *Evergreen Nursing Home,* 198 NLRB 775, 778-79 (1972). The Board has found that special circumstances justifying proscription of union insignia and apparel when their display may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, as part of its business plan, through appearance for its employees. *Nordstrom, Inc.*, 264 NLRB 698, 700 (1982). The Board, however, has expressly noted that "the 'special circumstances' exception is narrow..... a rule that curtails an employee's right to wear union insignia is *presumptively* invalid." *E&L Transport*, 331 NLRB 640, fn. 3 (2000).

In the instant case, the parties do not dispute the statutory right of employees to wear apparel in support of a labor organization or in support of an issue of common concern. Rather, the issue is whether the rule in question, when viewed in context, would be reasonably construed by employees to prohibit Section 7 activity. Respondent's appearance standards apply to employees "visiting the property when not in uniform" and expressly apply to employees "[w]hen on property for training, New Hire Orientation, meetings, or coming in to change for work." The rule, therefore, is not limited to what styles of clothing employees may wear on Respondent's property when reporting to work out of uniform. Rather the rule also applies to employees during their non-working hours prior to their scheduled shift. While the ALJ dismissed the allegation, he did so under the erroneous conclusion that the rule, when "fairly read, in the context where it appears, the adjective 'offensive' addresses matters of taste a reasonable person would regard as outside the norms of decency common in the community from which Respondent draws its customers." (ALJD at 4:8-11) The ALJ erred because the ambiguity of the rule's contents is such that it makes it unreasonable for an employee to conclude that it is limited to "matters of taste."

In examining Respondent's rule, one is required to consider the ordinary meaning of the words "profane," "vulgar" and "offensive"[2] as they might apply to clothing, followed by an examination of whether employees can reasonably understand those words to cover activity that is protected by the Act. Profane is defined in *The American Heritage Dictionary*, Fourth Edition (2001), as "to put to an improper, unworthy, degrading use." "Vulgar" is defined as "deficient in taste, cultivation, or refinement," while the term "offensive" is defined as "disagreeable to the

[2] In the Decision, the ALJ only addressed the use of the adjective "offensive" but made no reference to the use of "profane" and "vulgar" in the rule. The General Counsel alleges that all three words are ambiguous and overly broad.

senses." Id. In concluding the rule to be lawful, the ALJ interpreted the adjectives "profane," "vulgar," and "offensive," to apply to the each of the proceeding items of clothing prohibited by the rule.[3] A plain reading of the rule however, requires that the adjectives in question be read independently of the preceding description of prohibited articles of clothing. Following a list of prohibited types and styles of the clothing, the rule continues, with the following language "*clothing which displays profanity, vulgarity of any kind, obscene or offensive words or pictures.*" While the rule's preceding language consists of specific kinds of clothing banned by Respondent without reference to their content, the final 14 words of the rule could be reasonably read to apply to the content and message displayed on the article of clothing worn by an employee.

Based on the broad scope and applicability of Respondent's rule, employees could reasonably construe it to prohibit them from wearing clothing intended to protest working terms or conditions for fear that Respondent may deem it to be vulgar, profane, or offensive. For example, an employee might otherwise decline to wear an article of clothing which challenges Respondent's policies because it contains a catchy and inciting message which might be considered to violate the rule and result in discipline, including termination.

Interpreting the meaning of the rule is made difficult by its ambiguity and vagueness which was highlighted by the inability of Dean Allen, Respondent's Vice President of Labor Relations, to provide any explanation as to the type of clothing that would constitute profane or offensive under the rule. (Tr. 37-39) Mr. Allen's inability to provide insight speaks volumes, as he is responsible for resolving any grievances or disputes which might arise between Respondent and its employees. The absence of any objective guidance or the exclusion of Section 7 from its

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[3] The rule specifically prohibits the following articles of clothing: "bathing suits, bathing suits, short shorts, thong-type sandals, tube tops, halter tops, tank tops, thin straps, strapless clothing, midriff tops..."

scope, could reasonably lead employees to conclude that the rule prohibits conduct otherwise protected by Section 7.

B. The ALJ Erred in Finding the Rules Governing the Use of Respondent's Facilities by Off-Duty Employees to Not Violate Section 8(a)(1). [Exception No. 2 and 3]

The ALJ erred when he found that two separate rules maintained in Respondent's Employee Handbook which govern the use of its public facilities by off-duty employees are lawful.[4] Both rules require employees to obtain authorization from a manager prior to accessing Respondent's public facilities. The first such rule appears on page 2.19 of the Employee Handbook as rule 9 of 35 under the section labeled "Conduct Standards." The rule, along with the section's preamble, read:

> **Conduct Standards:** Out of Respect for our guests and each other, you are expected to maintain certain behavior and performance standards. The following list provides examples of behavior that can result in disciplinary action; it is not intended to be an exhaustive list. You are expected to use good judgment at all times in behaving appropriately work
>
> Although the violations noted below may result in immediate Separation of Employment or immediate Final Written Warning upon first offense, less severe offenses are viewed cumulatively and will normally be handled on a four-step basis of progressive discipline:
>
> - First Step – Documented Coaching
> - Second Step – Written Warning
> - Third Step – Final Written Warning
> - Fourth Step – Separation of Employment
>
> (JTX 1, pg. 2.17)

[4] In his Decision, the ALJ incorrectly noted that the second rule governing the use of Respondent's property by off-duty employees alleged in Paragraph 4(3) of the Complaint under the heading "Use of Facilities" "appears several pages ahead of rule 9" of the Handbooks "Conduct Standards." (ALJD 4:24-45) In fact, rule 9 alleged in Paragraph 4(2) of the Complaint appears on page 2.19, several pages before the rule alleged in Complaint Paragraph 4(3) appears on page 2.34 of the Employee Handbook. (JTX 1)

> 9. With your manager's authorization you may use the Rio public facilities while off duty. When doing so, employees must act professionally and adhere to Conduct Standards (note the above Conduct Standard regarding gambling). In addition, if alcohol is consumed, it should be done responsibly while having a meal. Employees participating in company-sponsored events where alcohol is served (e.g. awards banquets) must act responsibly and professionally. (JTX 1, pg. 2.19, no. 9)

The later rule is located in a separately labeled section titled "Use of Facility" several pages after rule 9 quoted above. The rule reads:

> Our guests have priority in using our facilities. *Employees, however, are welcome to visit the property as a guest during off-duty, non-peak business hours. Visits are permitted with your supervisor's or manager's approval as long as you are not in uniform. With that approval, you may visit public lounges, restaurants, casino and other public areas while off duty. When using any of the facilities as a guest you are restricted to public areas.* Even though off duty, you are expected to conduct yourself in a manner consistent with the Conduct Standards. Please ensure you review Conduct Standards #7 (gambling) and #9 (consuming alcohol) prior to visiting the property. (JTX 1, pg. 2.34) (Emphasis added)

In finding the rules lawful, the ALJ erroneously rejected the General Counsel's argument that the rules were so ambiguous that they could be reasonably construed to apply to exterior non-work areas and parking lots. See *Tri-County Medical Center,* 222 NLRB 1089 (1976). Instead the ALJ analogized the rules in question with a rule addressed by the Board in *Lafayette Park Hotel*, 326 NLRB 824 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). More specifically, the ALJ found the rules in the instant case "essentially indistinguishable from Hotel rule 6 found lawful in the *Lafayette Park Hotel* case." (ALJD 5:23-24) Contrary to the ALJ's findings, a careful examination of Hotel rule 6 and the Board's reasoning behind its finding reveals just how distinguishable the rule in the *Lafayette Park Hotel* case is from the rules in the instant case.

In *Lafayette Park Hotel*, 326 NLRB at 827, the Board considered whether Hotel rule 6 set forth in the respondent's employee handbook was violative of the Act. Hotel rule 6 read:

> 6. Employees are not permitted to use the restaurant or cocktail lounge for entertaining friends or guests without the approval of the department manager.

In concluding Hotel rule 6 to be lawful, the Board reasoned that the rule did "not mention or in any way implicate Section 7 activity" and noted that it "merely required permission for 'entertaining friends or guests.'" Id. Consequently the Board concluded that a reasonable employee would not interpret the rule as requiring prior approval for Section 7 activity.

Here, the rules are distinguishable from the rule considered by the Board in *Lafayette Park Hotel,* as their applicability is not limited to a specific area of Respondent's property or a specific purpose. In *Lafayette Park Hotel,* Hotel rule 6 only applied to employees who wanted to use the employer's "restaurant or cocktail lounge" for the purpose of "entertaining friends or guests" leaving little question about the rules applicability. Id. Respondent's rules, however, are broadly worded such that employees are instructed that prior authorization is required *anytime* they wish to visit or utilize any of Respondent's public facilities regardless of their purpose. For example, rule 9 which appears on page 2.19 of the Employee Handbook provides that employees "may use the Rio public facilities while off duty" with their manager's authorization. The rule contains additional instructions on the type of behavior employees are expected to exhibit, but is wholly silent on which "public facilities" require prior authorization. Moreover, the rule requires prior authorization anytime employees wish to use Respondent's public areas when off duty. Similarly, the Employee Handbook's "Use of Facility" rule on page 2.34 is equally ambiguous. The rule provides, among other things, that prior authorization is required to visit "public

lounges, restaurants, casino, and *other public facilities,*" without defining or explaining the meaning of "other public facilities." (Emphasis added)

The lack of specificity in the language of each rule and the ambiguousness of its applicability would reasonably be construed by an employee to include any of Respondent's public areas or facilities, interior and exterior. Therefore, the ALJ's conclusion that the rules "plainly" "address only the use of 'public' areas inside the hotel facility," is wholly unsupported.

It is well settled that a rule that requires employees to secure permission from their employer prior to engaging in protected concerted activities on an employee's free time and in non-work areas is unlawful. *Teletech Holdings, Inc.*, 333 NLRB 402, 403 (2001). Further, "except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking area will be found invalid." *Tri-County Medical Center,* 222 NLRB 1089 (1976). The applicability of each rule is not limited to specific locations of Respondent's public facilities or an employee's particular purpose for requesting to use Respondent's public facilities. While the ALJ is correct insofar as the fact that neither rule specifically states that it applies to Respondent's parking lots or exterior non-working areas and neither expressly bars Section 7 activity, each rule contains language ("public facilities") which could reasonably be perceived to apply to both interior and exterior areas of Respondent's property. Moreover, the rules, as currently written could reasonably be construed to apply anytime and for any purpose employees wish to visit Respondent's public facilities, including situations where they wish to take part in a union's leafleting campaign or rally.

C. The ALJ Erred in Finding Respondent's Confidentiality Rules Lawful. [Exception No. 4 and 5]

Complaint paragraph 4(4) and 4(5) allege two different confidentiality rules as violative of Section 8(a)(1) based on each rule's overly broad and ambiguous language. While the term

"confidentiality" first appears on page 2.19, employees are not provided with a definition or guidance on what constitutes confidential information until page 2.21 of the Employee Handbook under the section labeled "Confidentiality." This section and the rule contained therein, provide restrictions on the disclosure of confidential information while also providing several examples of what type of information Respondent deems to be confidential. The provision provides:

> **Confidentiality**: All employees are prohibited from disclosing to anyone outside of the Company, indirectly or directly, any information about the Company which has not been shared by the Company with the general public. This type of disclosure includes participation in internet chat rooms or message boards. Exceptions to this rule include disclosures which are authorized by the Company or required or authorized by the law. This information includes, but is not limited to:
>
> - Company financial data
> - Plans and strategies (development, marketing, business)
> - Organizational charts, salary structures, policy and procedures manuals
> - Research or analyses
> - Customer or supplier lists or related information
>
> The property or Corporate Law department should be consulted whenever there is a question about whether information is considered confidential. Any failure to uphold this policy should be communicated to the Law Department and may result in immediate Separation of Employment. All managerial, supervisory, and selected positions are required to comply with the "Use and Disclosure of Confidential Information" policy. (JTX 1, pg. 2.21)

Appearing several pages ahead in the Employee Handbook, under rule number 10 of the "Conduct Standards" section is the second rule which states "Employees will not reveal confidential company information to unauthorized persons." (JTX 1, pg. 2.19)

In reviewing the rules, the ALJ erred in concluding both rules to be lawful, despite the implications on employees Section 7 activities. The ALJ erroneously examined both rules in conjunction by utilizing the same analysis and reasoning, despite their contextual differences.

While acknowledging the apparent restrictions on Section 7 activities that the confidentiality rule on page 2.21 has on employees by prohibiting the disclosure of "organizational charts, salary structures, procedures manuals," the ALJ nonetheless concluded that the rules in question were "analogous to the rules the Board found lawful in *Lafayette Park Hotel.*" (ALJD at 6) Moreover, the ALJ found the Board's holding *Mediaone of Greater Florida, Inc.*, 340 NLRB 277 (2003), to be controlling and similarly analogous, and thus dismissed both allegations. (ALJD at 7)

In *Lafayette Park Hotel,* 326 NLRB at 826, the Board considered whether a rule contained in an employer's employee handbook could be construed to prohibit employees from prohibiting the discussion of wages and working conditions among employees or with a union. The rule held the following conduct to be unacceptable:

> Divulging Hotel-private information to employees or other individuals or entities that are not authorized to receive that information.

The Board reasoned that the rule "in no way precludes employees from conferring....with respect to matters directly pertaining to the employees' terms and conditions of employment." Id. The Board further recognized the right of employers to have a substantial and legitimate interest in maintaining the confidentiality of private information, "including guest information, trade secrets, contracts with suppliers, and a range of other proprietary information," and concluded that reasonable employees would not construe the rule to preclude them from engaging in Section 7 activity. Id.

In *Mediaone of Greater Florida*, the Board found an employer's rule concerning the disclosure of *proprietary* information to be lawful. Id. The rule which appeared under the label "*Proprietary Information*" placed limitations on the disclosure of "intellectual property" which included "customer and employee information, including organizational charts and databases." Id. at 278. The Board reasoned that "although the phrase 'customer and employee information,

including organizational charts and databases' is not specifically defined in the rule, it appears in within the larger provision prohibiting disclosure of 'proprietary' information, including *information assets* and *intellectual property*" and is listed as an example of 'intellectual property.'" Id. at 279.

The rule appearing on page 2.21 and alleged in Complaint paragraph 4(4) is contextually distinguishable from the rule in found lawful in *Lafayette Park Hotel* and *Mediaone of Greater Florida.* Here the rule expressly prohibits employees' from engaging in conduct protected by Section 7 rights as noted by the ALJ in his Decision. (ALJD at 6:41-47; 7:2-13) In fact, the Board has repeatedly held that employees have a protected right to discuss among themselves and others, the terms and conditions of their employment and infringement of that right violates the Act. *Double Eagle Hotel & Casino*, 341 NLRB 112, 115 (2004). The Board has specifically held that rules which prohibit discussion of salaries or wages are unlawful. See *Automatic Screw Products, Inc.*, 306 NLRB 1072 (1992).

Despite the ALJ's finding that the rule on page 2.21 is analogous to that found lawful by the Board in *Mediaone of Greater Florida*, a comparison of both rules quickly reveals that, unlike the rule in *Mediaone of Greater Florida,* the rule in the instant case makes no direct reference to proprietary information. Moreover, neither the rule in *Lafayette Park Hotel* nor *Mediaone of Greater Florida*, made any mention of the disclosure of "salary structure," a term which though undefined, is reasonably construed by any employee to include their wages and salaries.

In analyzing both of the rules in question, the ALJ evaluated rule number 10 on page 2.19 together with the confidentiality rule on page 2.21, despite the fact that the former appeared several pages before the latter. While the ALJ did not explain why this was done, perhaps the

absence of any definition of "confidentiality" led to the ALJ to import the definition found on page 2.21 to the rule on 2.19. If so, both rules are unlawful for the reasons described in the foregoing paragraphs. However, even if this were not the case and the Board were to analyze the rule on page 2.19 in the absence of any reference to what type of information is considered "confidential," the ambiguity of the rule is such that the rule would be reasonably construed by employees to prohibit them from sharing information about their wages or management with third parties, in violation of Section 8(a)(1).

D. The ALJ Erred in Not Finding Respondent's Computer Usage Rule to be Violative of Section 8(a)(1) and the Board Should Reconsider its Decision in *Register Guard.* [Exception No. 6 and 7]

The ALJ dismissed the allegations in Complaint paragraphs 4(6) and 4(7) which make up part of Respondent's "Computer Usage" policy contained on pages 2.13 through 2.16 of the Employee Handbook. (ALJD 8-9) The former rule applies to the general restrictions on the use Respondent's computer resources, while the latter relates to the disclosure and distribution of confidential information when using Respondent's computer resources.

i. The Board Should Overrule *Register Guard*, and Return to the Board's Previous Analytical Standards

The ALJ first considered the allegation involving Respondent's "general restrictions" on the use of computer resources. The section's preamble and the first rule in question which appears under the subsection titled "General Restrictions" reads:

> **Computer Usage:** Computer resources are Company property and are provided to authorized users for business purposes. The company has the right to review or seize computer resources, including hardware, software, documents and electronic correspondence. (JTX 1, pg. 2.13)

Computer resources may not be used to:

- Share confidential information with the general public, including discussing the company, its financial results or prospects, or the performance or value of company stock by using an internet message board to post any message, in whole or in part, or by engaging in an internet or online chatroom
- Convey or display anything fraudulent pornographic, abusive, profane, offensive, libelous or slanderous
- Send chain letters or other forms of non-business information
- Solicit for personal gain or advancement of personal views
- Violate rules or policies of the Company

Do not visit inappropriate (non-business) websites, including but not limited to online auctions, day trading, retail/wholesale, chat rooms, message boards and journals. Limit the use of personal email, including using streaming media (e.g., video and audio clips) and downloading photos. (JTX 1, pg. 2.14)

Bound by Board precedent, the ALJ declined to consider the General Counsel's appeal that the Board reconsider and overrule its holding in *Register Guard*, 351 NLRB 1110 (2007), and return to the analytical framework previously applied. (ALJD at 8-9) While the Board's holding in *Register Guard*, continues to be binding, the Board is urged to reconsider the reasoning behind its ruling and avoid being, as former Members Liebman and Walsh phrased it in their dissenting opinion, "the Rip Van Winkle of administrative agencies." Id. at 1121.

In *Register Guard*, the Board redefined discrimination under Section 8(a)(1) when it determined that employees do not have a statutory right to use an employer's e-mail system for Section 7 purposes. Id. at 1110. The Board held that "an employer may draw a line between charitable solicitations, between solicitations of a personal nature – and solicitations for the commercial sale of a product – and between business-related use and non-business related use." Id. at 1118. While Respondent's general restrictions on computer usage are facially valid under the Board's holding in *Register Guard*, the Board should return to its prior view of disparate treatment under Section 8(a)(1). In their dissenting opinion in *Register Guard*, former Members

Liebman and Walsh pointed out several flaws in the majority's reasoning. One such flaw is that the standard adopted in *Register Guard* fails to recognize that the essence of a Section 8(a)(1) violation is *interference* with Section 7 rights, not discrimination. Id. at 1129. *Register Guard* fails to take into account the affirmative nature of Section 7 rights, which should only be restricted to the extent necessary to accommodate an employer's special circumstances. Therefore, an employer's disparate treatment of communications which relate to Section 7 is unlawful because allowance of other non-work communications undermines the employer's business justification for interfering with Section 7 rights. Contrary to the Board's holding in *Register Guard*, it is not unlawful because it is "discriminatory" in the sense embraced by anti-discrimination statutes.

In the instant case, Respondent's policy permits employees to engage in non-work related activity such as checking personal e-mails and streaming on-line content. The rule, however, draws a line where the non-work related activity of employees involves the disclosure or discussion of confidential information including "discussing the company," mass e-mails which are similar to chain letters, and e-mails where employees "solicit for person gain or advancement." Such restrictions inhibit employee's Section 7 rights, as they do not allow for the expression of concerns which may later become logical outgrowths of group concerns or discuss wages or working conditions.

Prior to *Register Guard*, the Board held that when an employer permit employees to engage in the non-work related communications or postings using employer property, it had to similarly allow Section 7 communications or postings. See, e.g., *Benteler Industries*, 323 NLRB 712, 714 (1997), enfd. 149 F.3d 1184 (6th Cir. 1998); *Saint Vincent's Hospital*, 265 NLRB 38, 40 (1982), enfd. in part 729 F.2d 730 (11th Cir. 1984). The Board did, however, provide two

exceptions. First, an employer could allow business-related communications – those involving an integral part of an employer's necessary function, such as activities related to business or regular benefits package. See *Lucile Salter Packard Children's Hospital at Stanford v. NLRB*, 97 F.3d 583, 590-91 & fn.10 (D.C. Cir. 1996). Second, an employer could allow a small number of charitable activities without violating the Act. Id. at 587-88.

Under this prior standard, Respondent violated the Act by prohibiting Section 7-related communications while explicitly allowing non-work related communications under its general restriction computer usage policy. Based on the language of the general restriction and its allowed use of its computer resources for non-work related purposes – which extends well beyond the two narrow exceptions previously described – Respondent has violated the Act. Respondent's confidentiality rule as applied to its computer resources is unlawful for the reasons stated in the previous argument section and because it allows discussion with third parties except for the purpose of discussing topics which are otherwise protected by the Act.

ii. Respondent's Computer Usage and Confidentiality Rule

The ALJ next considered the second rule set forth in the "Computer Usage" section of Respondent's Employee Handbook which applies to the use of its "computer resources" to disclose and distribute confidential information. The confidentiality rule at issue, also contained on page 2.14, appears under the heading labeled "Confidentiality" and provides in relevant part:

> *Do not disclose or distribute outside of Harrah's any information that is marked or considered confidential* or proprietary *unless you have received a signed nondisclosure agreement through the Law Department*. In some cases, such as with Trade Secrets, distribution within the Company should be limited and controlled (e.g., numbered copies and a record of who has received the information). You are responsible for contacting your department manager or the Law Department for instructions. (JTX 2, pg. 2.14) (emphasis added)

In dismissing the allegation, the ALJ rejected the General Counsel's argument that the term "confidential" is defined by the other portions of the Employee Handbook, including the definition discussed above and located on page 2.21. (ALJD at 9:5-25) The ALJ's conclusion confirms the ambiguity of the rule which leave employees guessing at the meaning of "confidential" and having to seek clarification from a department manager or the Law Department.

The ALJ's dismissal of the allegation appears to be based on his conclusion that the rule applies to proprietary information and not to information protected by Section 7. A careful reading of the rule reveals, however, that such an interpretation is erroneous and not one that would be reached by a reasonable employee. While the rule makes mention of proprietary information, it makes a distinction between information considered to be confidential and information considered to be proprietary. The rule unambiguously applies to information that is marked or considered "confidential *or* proprietary." The use of "or" as a coordinated conjunctive serves to distinguish information which is "confidential" from information which is "proprietary."

Here, Respondent's rule allows employees to check (send and receive) e-mail but prohibits them from using it to disclose confidential information protected by Section 7. Thus, even under the Board's holding in *Register Guard*, Respondent's confidentiality rule is facially invalid.

E. The ALJ Erred in Finding Respondent's Rule's Banning Employee Photography Lawful. Exception No. 8, 9, and 10]

Respondent maintains two rules which prohibit employees from using cameras and any type of audio visual recording equipment or devices without prior authorization. Both rules

appear under the Employee Handbook's "Conduct Standards" section. The first rule, alleged in Complaint paragraph 4(8) appears on page 2.20 as rule number 24 and provides the following:

> 24. Personal pagers, beepers and cell phones worn by employees must not be visible or audible to guests and should not impact job performance. The use of personal cellular/digital phones is prohibited while on duty, but is allowed during break time in designated break areas. *Camera phones may not be used to take photos on property without permission from a Director or above.* (emphasis added)

The second rule in question appears on page 2.21 as rule number 35 and reads:

> 35. Cameras, any type of audio visual recording equipment and/or recording devices may not be used unless specifically authorized for business purposes (e.g. events).

After considering each rule, the ALJ summarily dismissed both allegations, reasoning that the Board's holding in *Flagstaff Medical Center,* 357 NLRB No. 65, slip op. (2001), is controlling and noting that "a hotel and casino operation has a strong interest in protecting and guarding the privacy of its guest even though the guests' privacy interests do not always enjoy some form of legal protection similar to that of hospital patients." (ALJD 10) The ALJ further reasoned that because "[i]n the overwhelming majority of instances, hotel employees understand and respect the privacy of hotel guests," employees would not "reasonably read a photography and filming ban as being *designed* to chill their Section 7 rights." (ALJD 11) (emphasis added) In other words, the ALJ believes that because Respondent's guests have certain privacy rights which employees are expected to respect, employees would not construe the rules to prohibit them from documenting their employer's unlawful acts by, for example, photographing captive audience meetings, vandalism of their personal property, unsafe working conditions or the removal of union literature. The ALJ is mistaken in believing that employees in this context would not construe the rules to infringe upon their Section 7 rights because they appreciate and respect the privacy of customers. Moreover, the ALJ appears to have conflated the various standards set forth in *Lafayette Park Hotel*, for

determining whether a rule is lawful when he noted that the common recognition and respect of guest privacy by employees "augurs against a conclusion that they would reasonably a photography filming ban as being *designed* to chill their Section 7 activities. (ALJD 11:2-4)

In dismissing the allegations, the ALJ overlooked the unique facts presented in *Flagstaff Medical Center*, not present in the instant case. In *Flagstaff Medical Center,* 357 NLRB No. 65, slip. op. at 4-5, which arose in the context of a hospital setting, the Board held that an employer's rule prohibiting employees from taking photographs of hospital patients or property was lawful. In reaching its conclusion, the Board reasoned that the employer had a "significant" interest in preventing wrongful disclosure of individually identifiable health information based upon federal legislation which safeguards patient health data. Id. at 5. More specifically, the employer's interest in protecting the privacy of its patients was based on the requirement of the *Health Insurance Portability and Accountability Act of 1996 (HIPAA)*, Pub. L. No. 104-91, 101 Stat. 1936 (codified as amended in scattered sections of 29 U.S.C., 42 U.S.C. and 18 U.S.C.), federal legislation which committed the federal government to a process of "Administrative Simplification" to reduce health care costs. In enacting HIPAA, Congress instituted aggressive safeguards to protect patient privacy by implementing statutory requirements upon health care providers and entities to properly protect health information of patients while allowing the flow of health information needed to provide and promote quality health care. 42 U.S.C § 1320d-2(d)(2) (2006). To ensure the integrity of patient privacy, HIPAA includes severe penalties for health care providers, entities, and employees who are found to violate the statute. See 42 U.S.C. § 1320d-6(b) (sets forth the criminal and civil penalties which can be imposed on individuals and entities who are found to be have committed a violation of the statute).

The unique obligations imposed on employers within the health care industry by federal laws and regulations renders the Board's holding in *Flagstaff Medical Center*, inapplicable

where an employer's "privacy interest" is driven by something other than HIPAA or a similar law. Personally identifiable health information is protected by law because of how tightly American society values the privacy of medical information. Such information, if disclosed, could have direct effects on an individual's existing or prospective employment, personal relationships, and even on his or her ability to engage in commerce, such as renting a home. The societal stigma attached to certain medical conditions such as mental illness or as was seen following the discovery of AIDS is undeniable and for this reason deeply guarded. Former President Clinton highlighted this point when he remarked that "[n]othing is more private than someone's medical or psychiatric records." See Press Release, The White House, Office of the Press Sec'y, Remarks by the President on Medical Privacy (Dec. 20, 2000), http://www.hhs.gov/ocr/privacy/hipaa/news/whpress.html (last visited April 13, 2012).

Contrary to the employer in *Flagstaff Medical Center*, Respondent is not a health care provider statutorily required to ensure the privacy of its patients or clients. Instead, Respondent is in the business of gaming and hospitality, an industry known for its overwhelming video surveillance of all guests. The ALJ appears to have overlooked this when he accepted Respondent's argument that "a hotel and casino operation has a strong interest in protecting and guarding the privacy of its guests even though the guests do not always enjoy some form of legal protection similar to that of hospital patients." (ALJD 10:42-45) Moreover, while correctly noting that an employer "may discharge an employee for a good reason, bad reason, or no reason at all so long as it is not prohibited by law" and "the law recognizes the right of an employer to establish workplace rules within a similar framework," the ALJ overlooked the fact that an employer is not free to interfere with the Section 7 rights of employees, absent special circumstances. (ALJD 10) Even as Respondent's employees appreciate the need to ensure the

privacy of guests, their appreciation and duties differ greatly from employees in the health care field, who are subject to civil and criminal liability for failing to protect the privacy of patients. While employers and employees alike are required to respect the privacy of guests when they are in the privacy of their hotel rooms, public restrooms, changing rooms, and spas, as well as to ensure the privacy of guest payment information, no other such obligations or liabilities exist beyond what is dictated by each individual employer. The fact that Respondent is a casino calls to question the basis of the rules when one considers that casinos guests are under 24-hour surveillance. For this reason, the ALJ's conclusion that Respondent's employees would not construe the rules to apply to Section 7 activity based on the limited privacy rights of hotel guests is incorrect. In reaching this conclusion the ALJ, incorrectly held Respondent's employees to the same standard as hospital employees despite the differences in their obligations to protect and respect the privacy of guests or patients and the differences in employment environment.

IV. CONCLUSION

Based on the foregoing, the General Counsel respectfully requests that the Board reverse the ALJ's erroneous rulings as set forth above, and find that Respondent committed additional violations of Section 8(a)(1) as discussed above.

Dated at Las Vegas, Nevada, this 17th day of April 2012.

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CERTIFICATE OF SERVICE

I hereby certify that the **BRIEF IN SUPPORT OF ACTING GENERAL COUNSEL'S EXCEPTIONS** in Case 28-CA-060841, were served via E-Gov, E-Filing, and electronic mail, on this 17th day of April 2012, on the following:

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